

The record consists of the documents filed of record with the Division of Workers Compensation in this docketed matter, including the Preliminary Hearing transcript of August 25, 1994, before Administrative Law Judge Shannon S. Krysl, and the exhibits attached thereto.

ISSUES

- (1) Did claimant provide notice to the respondent of an injury arising out of and in the course of her employment on April 6, 1994? If not, was there just cause for claimant's failure to provide notice as is required by K.S.A. 44-520?

Additional issues were listed in the respondent's Application for Review but the Order of Administrative Law Judge Shannon S. Krysl, dated August 25, 1994, found claimant's claim compensable for notice purposes and made no other findings. As such, the appeal from said Order is limited to the issue above listed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds:

Claimant has failed to prove by a preponderance of the credible evidence that she provided notice to the respondent of the injury alleged on April 6, 1994, and has further failed to provide evidence that this lack of notice was due to just cause.

Claimant, a clerk, alleged an injury on April 6, 1994, while carrying cases of pop in a walk-in cooler. Claimant's leg became caught between cases of pop and when she attempted to wrench her leg free, she felt pain in her right knee and low back. Claimant did not mention this incident to her employer, Patricia Burge, for fear of losing her job. Claimant alleges that she did casually mention the incident to other employees but could not remember their names. Several days after the incident, she told another employee, Dana Bybee, of the incident and was told to be more careful. Claimant thought Ms. Bybee might be her supervisor but testimony from Patricia Burge indicated that Ms. Bybee had no supervisory responsibilities over claimant.

Ms. Burge, the co-owner, was at the establishment seven (7) days a week, up to twelve (12) hours per day, and was available on many occasions for claimant to discuss the injury with her had claimant been so inclined. Ms. Burge was never informed that claimant suffered an injury. Respondent's first notice of this injury occurred on or about May 4, 1994, when claimant's E-1 was filed with the Director of Workers Compensation.

In proceedings under the Workers Compensation Act, the burden of proof shall be on the claimant to establish claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends. K.S.A. 44-501(a).

K.S.A. 44-508(g) defines burden as follows:

“‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.”

This burden must be established by claimant by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The purpose of K.S.A. 44-520 is to afford the employer an opportunity to investigate the accident and to furnish prompt medical treatment. Pike v. Gas Service Co., 223 Kan. 408, 573 P.2d 1055 (1978); Wiethorn v. Safeway Stores, Inc., 16 Kan. App. 2d 188, 820 P.2d 719, rev. denied 250 Kan. 808 (1991).

Claimant alleged her notice to Dana Bybee would be sufficient as she thought Ms. Bybee was her supervisor. There was no indication from claimant that she had been told by the respondent that Ms. Bybee was her supervisor and this reliance by claimant on her own speculation is unjustified. While notice to an immediate supervisor has been held sufficient to satisfy the requirements of K.S.A. 44-520, it is claimant's burden to prove that notice to her immediate supervisor was provided. See Taylor v. Missouri Pac. Rld. Co., 146 Kan. 668, 73 P.2d 62 (1937); Phillips v. Helm's Inc., 201 Kan. 69, 439 P.2d 119 (1968).

As claimant has not proven that she provided notice of the accident, including time, place and particulars thereof, within ten (10) days after the date of the accident, the Appeals Board must look to see if evidence exists to show that claimant's failure to notify the respondent was due to just cause. Claimant's only excuse for not providing notice to the respondent was that she feared the loss of her job for having suffered a work-related injury. No evidence was presented by claimant to show respondent had, in the past, terminated employees for having suffered workers compensation injuries. Further, Patricia Burge, co-owner of the respondent establishment, testified that claimant's termination of employment on April 22, 1994, had nothing to do with any injury alleged by claimant at work but rather was the result of claimant's slow work speed. Ms. Burge testified that she was not even aware claimant had suffered an injury at the time of the termination and thus it could not have played a part in her decision.

It is the claimant's burden to prove claimant's right to an award of compensation by proving all of the conditions on which claimant's right depends including the notice requirements under K.S.A. 44-520. The Appeals Board finds claimant has failed to prove by a preponderance of the credible evidence that notice was provided to the respondent within ten (10) days of the accident and further finds that claimant has failed to prove that this failure to provide notice was due to just cause.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Shannon S. Krysl, dated October 25, 1994, shall be, and hereby is, reversed as claimant has failed to prove notice was provided to the respondent under K.S.A. 44-520 and further finds claimant has not proven the failure to provide notice under this section was due to just cause.

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority finding of the Appeals Board. The claimant established just cause in failing to notify the respondent of the accident within ten (10) days of its occurrence.

Under the notice statute, K.S.A. 44-520, an injured worker has ten (10) days to provide notice of accident. This period may be extended to seventy-five (75) days for just cause. Just cause is to be determined on a case-by-case basis considering all facts and circumstances including, among other factors, perceived severity of injury, perceived risk to employment and knowledge of the notice requirements of the Workers Compensation Act. The Workers Compensation Act is to be liberally construed to bring the parties within its provisions. See K.S.A. 44-501. The term just cause should also be liberally construed.

BOARD MEMBER

c: Garry Howard, Wichita, KS
Eric Kuhn, Wichita, KS
Stuart Collier, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director